

Guilty But Mentally Ill: Broadening the Scope of Criminal Responsibility

I. INTRODUCTION

On a cold January day in 1843 Daniel M'Naghten attempted to assassinate England's prime minister, Robert Peel, by firing into Peel's carriage.¹ Edward Drummond, Peel's private secretary, who was riding in the carriage at the time, was killed by mistake.² At the ensuing trial the jury found that M'Naghten suffered from paranoid delusions, and returned a verdict of not guilty on the ground of insanity.³

On March 30, 1981, John W. Hinckley, Jr., lying in ambush outside the Washington Hilton Hotel, fired a series of shots, seriously wounding the President of the United States and three other persons.⁴ Over a year later, after an eight week trial, the assailant was found not guilty by reason of insanity.⁵

Separated by over a century, these two events are more than factually similar. Both spawned intense nationwide debate concerning the insanity defense and its ramifications.⁶ While *M'Naghten's Case*⁷ resulted in a standardized insanity test,⁸ the Hinckley verdict has raised serious questions about the future of the insanity defense.

Among the recent criticisms of the insanity defense are that "it spurs crime, frees criminals, relies too much on experts, holds psychiatrists up to ridicule, sends trouble makers to hospitals and defies definition."⁹ Suggestions for reform range from abolishing the defense to retaining it with minor modifications.¹⁰ Judge Irving Kaufman, writing in the *New York Times*, warns against too precipitous a response: "[W]hatever changes are made should not be the result of an urge to punish a particular man. The principle behind the insanity defense—that individuals may take actions for which they cannot justly be held criminally responsible—should not be abandoned thoughtlessly."¹¹

Public outcry against the insanity defense, engendered by prominent cases, has prompted state legislatures to reexamine their laws and to propose reforms for perceived deficiencies. A solution that has gained increasing acceptance is the guilty but

1. Kaufman, *The Insanity Plea on Trial*, N.Y. Times, Aug. 8, 1982, § 6 (Magazine), at 16, 17.

2. *Id.*

3. M'Naghten's Case, 8 Eng. Rep. 718, 719 (1843).

4. N.Y. Times, March 31, 1981, at A1, col. 5.

5. Kaufman, *supra* note 1, at 16. (Irving Kaufman is a judge on the United States Court of Appeals for the Second Circuit. His opinion in *United States v. Freeman*, 357 F.2d 606 (2d Cir. 1966), established the standard for the insanity defense in that circuit.)

6. *Id.* at 16, 17.

7. 8 Eng. Rep. 718 (1843).

8. See *infra* text accompanying notes 77-87.

9. *The Insanity Plea on Trial*, NEWSWEEK, May 24, 1982, at 56, 56.

10. *Reforming the Insanity Defense: Five Views*, STATE LEGISLATURES, Oct. 1982, at 21, 21-22.

11. Kaufman, *supra* note 1, at 17.

mentally ill (GBMI) plea and verdict first enacted by Michigan in 1975.¹² Although other states initially were slow to emulate, within the past two years seven additional states have enacted GBMI laws¹³ and several others, including Ohio,¹⁴ are considering similar legislation.

Generally, GBMI provisions offer the jury an additional verdict to supplement the traditional not guilty, not guilty by reason of insanity (NGRI), and guilty findings. When NGRI is pleaded, the jury may find the defendant GBMI instead.¹⁵ Once the GBMI verdict is returned, the court must impose "any sentence which could be imposed pursuant to law upon a defendant who is convicted of the same offense."¹⁶ The defendant may then be given psychiatric treatment, but upon discharge he must serve the remainder of his sentence.¹⁷

Although seemingly an acceptable compromise aimed at those who do not have sufficient mental disturbance to meet the test of legal insanity and who would otherwise be found guilty,¹⁸ constitutional and practical problems plague GBMI laws. Due process concerns arise since no hearing is provided to the GBMI defendant on the issue of present mental health,¹⁹ and equal protection challenges proceed on the theory that the GBMI classification is an irrational one.²⁰ Commentators have also foreseen potential violations of the prohibition against cruel and unusual punishment²¹ and the possibility of misapplication of GBMI by the jury.²²

This Comment will examine the operation, development, and constitutionality of the insanity defense, the perceived weaknesses of which led directly to the creation of the GBMI laws. The evolution of the GBMI laws and the concomitant constitutional problems will be discussed in detail, with particular attention to the proposed legislation that would create the verdict in Ohio. Finally, this Comment will discuss the viability of GBMI generally and alternative solutions to the problems that the verdict seeks to address.

II. THE INSANITY DEFENSE

A. Operation

Two major goals of any system of criminal law are to define the conduct for which sanctions will be imposed and to identify the appropriate subjects of those sanctions.²³ At the foundation of the Anglo-American criminal justice system lies the assumption that man is a responsible creature with a free will.²⁴ This conception

12. MICH. COMP. LAWS ANN. § 768.36 (West 1982).

13. See *infra* text accompanying notes 161-72.

14. S. 13, 115th Gen. Assy., Reg. Sess. (Ohio 1983-1984).

15. See, e.g., MICH. COMP. LAWS ANN. § 768.36(1) (West 1982).

16. *Id.* § 768.36(3).

17. *Id.*

18. Comment, *Guilty But Mentally Ill: A Reasonable Compromise for Pennsylvania*, 85 DICK. L. REV. 289, 319 (1981).

19. See *infra* text accompanying notes 176-87.

20. See *infra* text accompanying notes 188-205.

21. See *infra* text accompanying notes 206-16.

22. See *infra* text accompanying notes 217-27.

23. Goldstein & Katz, *Abolish the "Insanity Defense"—Why Not?*, 72 YALE L.J. 853, 853 (1963).

24. Monahan, *Abolish the Insanity Defense?—Not Yet*, 26 RUTGERS L. REV. 719, 725 (1973).

requires that an offense include both an element of criminal intent or "guilty mind" (*mens rea*) and an act or omission (*actus reus*).²⁵ The insanity defense is based on the theory that a finding of insanity implies the nonexistence of the requisite criminal intent.²⁶ A person whose mental condition prevents the formation of intent generally is not held criminally responsible for his actions.²⁷

1. *Burden of Proof*

The law creates a presumption of legal sanity at trial.²⁸ To rebut this presumption and to bring sanity into issue, the defendant has the burden of producing either some evidence of legal insanity or enough evidence to raise a reasonable doubt, depending on the jurisdiction.²⁹ Once the burden of going forward has been met, courts must address the procedural question of which party should bear the burden of persuasion.

Early common law required the defendant to prove his insanity to the trier of fact to avoid criminal responsibility.³⁰ This is the current rule in England.³¹ The defendant carried the burden of persuasion in most of the states until 1895, when the Supreme Court held in *Davis v. United States*³² that the prosecution carries this burden in federal cases.³³ The issue of whether states would also have to place the burden of persuasion on the prosecution arose in *Leland v. Oregon*.³⁴ The United States Supreme Court held the Oregon statute, which placed the burden of proving insanity on the defendant, constitutional.³⁵

The vitality of the *Leland* holding became doubtful after the Supreme Court's decisions in *In Re Winship*³⁶ and *Mullaney v. Wilbur*.³⁷ The Court held in *Winship* that due process requires the prosecution to prove every element of a crime beyond a

25. The behavioral position, on the other hand, considers only whether the defendant committed the physical act. After conviction, *mens rea* is considered by a panel of experts in determining disposition. *Id.* at 733. See generally H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 11-15 (1968); B. WOOTTON, *CRIME AND THE CRIMINAL LAW* 58-84 (1963).

26. See, e.g., Comment, *Guilty But Mentally Ill: An Historical and Constitutional Analysis*, 53 U. DET. J. URB. L. 471, 472 (1976) [hereinafter cited as Comment, *Guilty But Mentally Ill*]; Comment, *Insanity—Guilty But Mentally Ill—Diminished Capacity: An Aggregate Approach to Madness*, 12 J. MAR. J. PRAC. & PROC. 351, 351 (1979).

27. See W. LAFAVE & A. SCOTT, *HANDBOOK ON CRIMINAL LAW* § 36, at 271-72 (1972). The authors discuss the six theories of criminal punishment and explain why they are considered inapplicable to the insane. (1) Prevention—ineffective since the insane are unlikely to recognize the significance of sanction; (2) Restraint—provided by the insanity defense; (3) Rehabilitation—the insane are believed to require unique treatment and the insanity defense already diverts the insane person to a mental hospital; (4) Deterrence—the general public would not be deterred by observing the punishment of the insane since it does not identify with the offender; (5) Education—the insanity defense is most frequently interposed for inherently bad crimes for which there is no need to educate; and (6) Retribution—it is believed that those who are not morally culpable should not be punished. *Id.*

28. *Id.* § 40, at 312.

29. *Id.* § 40, at 313.

30. See, e.g., Note, *Stopping the Revolving Door: Adopting a Rational System for the Insanity Defense*, 8 HOFSTRA L. REV. 973, 982 (1980) [hereinafter cited as Note, *Revolving Door*].

31. *Leland v. Oregon*, 343 U.S. 790, 796-97 (1952) (discussing the origins of statutes allocating the burden of proof).

32. 160 U.S. 469 (1895).

33. *Id.* at 485.

34. 343 U.S. 790 (1952).

35. *Id.* at 799.

36. 397 U.S. 358 (1970).

37. 421 U.S. 684 (1975).

reasonable doubt.³⁸ In *Mullaney* the Court struck down a Maine statute that defined murder to include an element of malice aforethought. To reduce a murder charge to one of manslaughter the statute required the defendant to rebut a presumption of malice by proving that he acted in the heat of passion on sudden provocation. The Court, in applying the *Winship* holding, found that due process requires the prosecution to prove the absence of heat of passion and that states could not undermine *Winship* by redefining elements of a crime, characterizing them only as factors bearing on the extent of punishment.³⁹ The requirement that each element be proved beyond a reasonable doubt logically applies to the insanity defense as well. No distinction between sanity and *mens rea* that would justify excluding sanity from those elements that the prosecution has the constitutional burden of proving has ever been adequately articulated.⁴⁰ Nevertheless, the Supreme Court has refused to explicitly overrule *Leland*. In *Patterson v. New York*,⁴¹ the *Leland* holding was reaffirmed in a decision that marked a substantial retreat from the *Winship* and *Mullaney* doctrine.⁴²

Several commentators have argued persuasively that states should again place this burden on the defendant.⁴³ A prosecution's inability to prove sanity beyond a reasonable doubt may result merely from the speculative nature of expert testimony.⁴⁴ Placing the burden on the defendant would also remove some inconsistency between the trial and commitment hearings, in which the prosecution has the burden of proving that a NGRI acquittee is mentally ill.⁴⁵ A procedural imperfection presently exists because a NGRI acquittee may be released when the prosecution fails to prove the defendant sane by a reasonable doubt at trial and then fails to show at a post-trial hearing that the defendant is sufficiently mentally ill to require commitment.⁴⁶

2. Acquittal and Commitment

When a NGRI verdict is returned, a defendant is subject to a civil commitment hearing rather than being released as with other defenses.⁴⁷ Prior to 1960 insanity acquittees could be automatically committed as a preventive measure for the protection of society without further hearings on the issue of present sanity.⁴⁸ As the civilly

38. 397 U.S. 358, 364 (1970).

39. 421 U.S. 684, 698 (1975).

40. Note, *Revolving Door*, *supra* note 30, at 989.

41. 432 U.S. 197 (1977).

42. A New York statute that required the defendant to prove extreme emotional distress was upheld. The Supreme Court distinguished *Mullaney* and limited it to cases in which malice or lack of provocation is included within a statutory definition of the crime. *Id.* at 215-16.

43. See, e.g., Bonnie, *The Moral Basis of the Insanity Defense*, 69 A.B.A. J. 194, 197 (1983); Kaufman, *supra* note 1, at 20; Note, *Revolving Door*, *supra* note 30, at 982-92.

44. Note, *Revolving Door*, *supra* note 30, at 989.

45. *Id.* at 990-91.

46. Kaufman, *supra* note 1, at 20.

47. See generally W. LAFAVE & A. SCOTT, *supra* note 27, § 36, at 269; H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 132 (1968); Goldstein & Katz, *Abolish the "Insanity Defense"—Why Not?*, 72 YALE L.J. 853, 854-59 (1963).

48. Sherman, *GUILTY BUT MENTALLY ILL: A Retreat from the Insanity Defense*, 7 AM. J.L. & MED. 237, 242 (1981).

committed gained more rights, courts began to subject the procedures governing NGRI acquittees to due process and equal protection scrutiny. In *Bolton v. Harris*⁴⁹ the District of Columbia Circuit Court of Appeals determined that no presumption could be drawn regarding a NGRI acquittee's continuing insanity and that due process required that a hearing be held on the issue. Temporary detention was permitted, however, for purposes of examination.⁵⁰ Equal protection concerns were also implicated because neither the civilly committed nor the NGRI acquittee had been convicted of a crime.⁵¹ Since the two classes are similarly situated, they should be treated with substantial equality. Today, regarding both treatment and release procedures, the trend is toward greater equality between the two groups.⁵²

B. History and Development

The insanity defense is not a standardized formula, but one that varies by jurisdiction. Four basic approaches have been employed by the courts: the *M'Naghten* rule,⁵³ the irresistible impulse test,⁵⁴ the *Durham* test,⁵⁵ and the American Law Institute's Model Penal Code formula.⁵⁶ All but the *Durham* test are currently used in the United States.⁵⁷ Understanding the purpose of the GBMI verdict and its place within the structure of criminal law requires an examination of the evolution and particularly the weaknesses of the insanity tests.

1. Pre-M'Naghten

Insanity has not always been a defense for criminal responsibility.⁵⁸ The first use of insanity to excuse criminal conduct appeared in the thirteenth century in the form of pardons.⁵⁹ Not until the fourteenth century did absolute madness become a complete defense to a crime.⁶⁰

In these early years insanity was not a well-understood phenomenon. The initial rules were largely a fusion of various commentators' views.⁶¹ Bracton, writing in the thirteenth century, was one of the earliest legal commentators to consider insanity.⁶²

49. 395 F.2d 642 (D.C. Cir. 1968).

50. *Id.* at 651.

51. *Id.* at 650.

52. Sherman, *supra* note 48, at 250.

53. See *infra* text accompanying notes 77-87.

54. See *infra* text accompanying notes 88-94.

55. See *infra* text accompanying notes 95-105.

56. See *infra* text accompanying notes 106-14.

57. Annot., 9 A.L.R. 4th 526, 530 (1981).

58. R. PERKINS & R. BOYCE, CRIMINAL LAW 950 (3d ed. 1982).

59. See generally S. GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW 123-60 (1925) (early history of legal tests for excusing criminal responsibility); R. PERKINS & R. BOYCE, CRIMINAL LAW 950 (3d ed. 1982); Gray, *The Insanity Defense: Historical Development and Contemporary Relevance*, 10 AM. CRIM. L. REV. 559, 559-65 (1972). These pardons were issued regularly by the time of Edward I (1272-1307); during Edward II's reign (1307-1327) insanity was recognized as a defense, although chattels were still forfeited. R. PERKINS & R. BOYCE, CRIMINAL LAW 950 (3d ed. 1982).

60. S. GLUECK, *supra* note 59, at 125. This occurred during the reign of Edward III (1327-1377). *Id.*

61. See, e.g., *id.* at 123-60; Lewinstein, *The Historical Development of Insanity as a Defense in Criminal Actions* (pt. 1), 14 J. FORENSIC SCI. 275, 276-80 (1969).

62. S. GLUECK, *supra* note 59, at 126.

He defined a madman as "one who does not know what he is doing, . . . who lacks in mind and reason, and who is not far removed from the brutes."⁶³ This definition contains rudiments of two of the tests later utilized—the "right-wrong"⁶⁴ and "wild beast" tests.⁶⁵

Writing in the sixteenth century, Fitzherbert defined an idiot as "such a person who cannot account or number twenty pence, nor can tell who was his father or mother, nor how old he is."⁶⁶ A century later, Coke introduced the concept of intent and purpose,⁶⁷ which Lord Hale, too, adopted, but with the reservation that criminal intent was negated only by total, not partial, insanity.⁶⁸ He utilized the mental capabilities of a fourteen-year-old as the standard for his test.⁶⁹ The eighteenth century brought Hawkins' "good-and-evil" test, that was to be a forerunner of the "right-wrong" test.⁷⁰

The early case law dealing with insanity cannot be characterized as an integrated exposition of the law, but rather as the product of isolated thrusts at the problem. *Arnold's Case*⁷¹ marked the judicial origin of the "wild beast" test: one who has no more mental capacity than a beast is not criminally responsible.⁷² *Earl Ferrers' Case*,⁷³ used the "right-wrong" test and construed Hale's doctrine to mean that only one totally deprived of reason could be found not criminally responsible.⁷⁴ Delusion as a test for criminal responsibility was introduced in *Hadfield's Case*⁷⁵ by Lord Erskine. As one commentator cogently remarks, "[The] process of seizing upon incidental, or at the most, partial, statements of predecessors and adhering to them with uncritical dogmatism has marked the legal history of the subject to this day."⁷⁶

2. M'Naghten or "Right-Wrong" Test

When Daniel M'Naghten was tried after attempting to assassinate the British prime minister, a verdict of not guilty on the ground of insanity was returned.⁷⁷ It was found at trial that the defendant suffered from acute paranoia and delusions. The resultant public outrage served as an impetus for discussion in the House of Lords and

63. *Id.* (citing 1 WHARTON & STILLÉ, MEDICAL JURISPRUDENCE 510 (1878)).

64. *See infra* text accompanying notes 77–87.

65. *See infra* text accompanying note 72.

66. S. GLUECK, *supra* note 59, at 128 (citing 1 W. HAWKINS, PLEAS OF THE CROWN 2 (1st ed. 1716)).

67. Lewinstein (pt. 1), *supra* note 61, at 276.

68. *Id.* at 276–77.

69. *Id.* at 277. Hale stated, "[S]uch a person as labouring under melancholy distempers hath yet ordinarily as great understanding as ordinarily a child of fourteen hath, is such a person as may be guilty of treason, or felony." *Id.* (citing 1 M. HALE, THE HISTORY OF THE PLEAS OF THE CROWN 29 (1778)).

70. S. GLUECK, *supra* note 59, at 137–38. "Those who are under a natural disability of distinguishing between good and evil, as infants under the age of discretion, idiots, and lunatics, are not punishable by any criminal prosecution whatsoever." *Id.* at 138 (citing W. HAWKINS, PLEAS OF THE CROWN 1–2 (1st ed. 1716)).

71. *Rex v. Arnold*, 16 Howell's State Trials 695 (1724).

72. *Id.* at 764–65. Judge Tracy, in his charge to the jury, stated, "[I]t must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or a wild beast, such a one is never the object of punishment." *Id.* at 765.

73. 19 Howell's State Trials 885 (1760).

74. Lewinstein (pt. 1), *supra* note 61, at 278.

75. 27 Howell's State Trials 1281 (1800).

76. S. GLUECK, *supra* note 59, at 141.

77. M'Naghten's Case, 8 Eng. Rep. 718, 720 (1843).

the decision to ask fifteen common-law judges for an opinion on the law governing such cases.⁷⁸ The judges' responses became the basis for the test of insanity used in England and America for almost one hundred years.⁷⁹

The standard "right-wrong" test adopted in *M'Naghten* appears in the answer to the second and third questions asked of the judges.⁸⁰

[T]he jurors ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, *the party accused was labouring under such a defect of reason, from disease of mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.*⁸¹

This rule, while once widely accepted, has been the subject of a great deal of controversy. Critics argue that the language of the test, particularly words like "knowledge" and "wrong," is vague and ambiguous.⁸² They also claim that the test restricts expert testimony, but this charge is largely unsubstantiated.⁸³ Probably the most frequent criticism characterizes the test as based on an obsolete conception of the nature of insanity because it emphasizes only the individual's cognition and ignores volitional elements.⁸⁴

These defects are not inherent in the *M'Naghten* test. It has been more rigidly and narrowly construed than necessary.⁸⁵ The judges in the original case provided latitude for modification as the "circumstances of each particular case may require."⁸⁶ In practice, however, the rule became a "rigid codification of early examples of its application . . . [when] . . . the combination of increased knowledge and open-minded interpretation could have made *M'Naghten* an effective insanity test."⁸⁷

3. Irresistible Impulse Test

Dissatisfaction with the *M'Naghten* test's exclusive emphasis on the cognitive element led to the creation of the irresistible impulse test. The creators of the test

78. Lewinstein (pt. 1), *supra* note 61, at 281.

79. Gray, *supra* note 59, at 567. See generally Hovenkamp, *Insanity and Criminal Responsibility in Progressive America*, 57 N.D.L. REV. 541, 544-51 (1981), for a discussion of the psychological theories prevailing at the time of the case. Hovenkamp examines the attitudes that contributed to the creation of the insanity tests.

80. S. GLUECK, *supra* note 59, at 178. The questions were as follows:

2d. What are the proper questions to be submitted to the jury, when a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons, is charged with the commission of a crime (murder, for example), and insanity is set up as a defence?

3d. In what terms ought the question to be left to the jury, as to the prisoner's state of mind at the time when the act was committed?

M'Naghten's Case, 8 Eng. Rep. 718, 720 (1843).

81. *M'Naghten's Case*, 8 Eng. Rep. 718, 722 (1843) (emphasis added).

82. See, e.g., Lewinstein (pt. 1), *supra* note 61, at 283.

83. W. LAFAVE & A. SCOTT, *supra* note 27, § 37, at 282.

84. See, e.g., *id.*, at 280; Lewinstein (pt. 1), *supra* note 61, at 283; Comment, *Insanity—Guilty But Mentally Ill—Diminished Capacity: An Aggregate Approach to Madness*, 12 J. MAR. J. PRAC. & PROC. 351, 359 (1979).

85. See S. GLUECK, *supra* note 59, at 185; Gray, *supra* note 59, at 572-76.

86. *M'Naghten's Case*, 8 Eng. Rep. 718, 723 (1843).

87. Gray, *supra* note 59, at 567.

believed that the effect of insanity on emotions and will power should also be considered.⁸⁸

The volitional theory was first mentioned in *State v. Thompson*,⁸⁹ an 1834 decision of the Ohio Supreme Court. The court considered the power to choose to do or not to do an act a necessary element for conviction.⁹⁰ However, the leading judicial exposition of the irresistible impulse test appeared later in *Parsons v. State*.⁹¹ Judge Somerville maintained that freedom of will and the capacity to intellectually discriminate, must both be elements of legal responsibility.⁹² Subsequently, the additional element identified in *Parsons* was added to the *M'Naghten* test in many American states, although it never became the law in England.⁹³ Commentators have found this test too restrictive because it fails to take into account those mental illnesses characterized by brooding and reflection.⁹⁴

4. Durham or Product Test

Discontent with the *M'Naghten* rule continued even after it was supplemented with the irresistible impulse test. Largely influenced by the ideas contained in Dr. Ray's *Medical Jurisprudence of Insanity*,⁹⁵ Judge Charles Doe established a product test in the New Hampshire case of *State v. Pike*.⁹⁶ Doe believed that *M'Naghten* was outdated even before it was formulated. "The law does not change with every advance of science; nor does it maintain a fantastic consistency by adhering to medical mistakes which science has corrected."⁹⁷

The test elucidated in *State v. Pike* was not emulated by other courts until the decision of the District of Columbia Circuit Court of Appeals in *Durham v. United States*.⁹⁸ The court's holding that "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect"⁹⁹ is basically a reformulation of the New Hampshire test, with one crucial difference. The New Hampshire rule is an evidentiary rule while that of *Durham* is a substantive rule of

88. See, e.g., Lewinstein, *The Historical Development of Insanity as a Defense in Criminal Actions* (pt. 2), 14 J. FORENSIC SCI. 469, 469 (1969).

89. Wright's Ohio Rep. 617 (1834).

90. *Id.* at 622.

91. 81 Ala. 577, 2 So. 854 (1887).

92. *Id.* at 585, 2 So. at 859.

93. Lewinstein (pt. 2), *supra* note 88, at 476-77. Today only five states—Colorado, Georgia, Iowa, New Mexico, and Virginia—still adhere to the test. Annot., 9 A.L.R. 4th 526, 534-35 (1981).

94. See, e.g., W. LAFAVE & A. SCOTT, *supra* note 27, § 37, at 284-85.

95. Lewinstein (pt. 2), *supra* note 88, at 481.

96. 49 N.H. 399 (1869). Judge Doe stated the rule in his opinion thus:

The principles of the law were maintained at the trial of the present case, when, experts having testified as usual that neither knowledge nor delusion is the test, the court instructed the jury that all tests of mental disease are purely matters of fact, and that if the homicide was the offspring or product of mental disease in the defendant, he was not guilty by reason of insanity.

Id. at 442.

97. *Id.* at 438.

98. 214 F.2d 862 (D.C. Cir. 1954).

99. *Id.* at 874-75.

law.¹⁰⁰ In a few short years, the *Durham* rule hardened and left little latitude for new medical discoveries.¹⁰¹

Soon the inherent difficulties of the *Durham* test were revealed. Its terms were ambiguous and, because of the lack of standard definitions for "mental disease" and "mental defect," juries were forced to rely too greatly on expert psychiatric testimony.¹⁰² In *McDonald v. United States*¹⁰³ the District of Columbia Circuit Court of Appeals attempted to alleviate this problem by enlarging the definitions, but problems with ambiguity and the concept of causal connection persisted. Finally, in *United States v. Brawner*,¹⁰⁴ eighteen years after first adopting the product test, the Court of Appeals abandoned it. Today *Durham* is no longer followed anywhere in the United States, although New Hampshire still adheres to its unique product test.¹⁰⁵

5. ALI Model Penal Code Test

In 1953 the American Law Institute (ALI) commenced a study of the problems entailed in determining criminal responsibility.¹⁰⁶ Its solution is embodied in section 4.01 of the Model Penal Code, which the ALI officially adopted in 1962. Section 4.01 states:

(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law.

(2) As used in the Article, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.¹⁰⁷

In formulating this test, the ALI took the view that both impairment of volitional capacity and cognition must be considered.¹⁰⁸ Thus, the Model Penal Code test is similar to the *M'Naghten* rule supplemented by the irresistible impulse test, without either test's historical inadequacies. The ALI test differs from *M'Naghten* in that it calls for "substantial" rather than complete impairment. The drafters recognized the absence of absolutes and allowed more leeway for psychiatric testimony.¹⁰⁹ The Model Penal Code test also takes into account actions accompanied by brooding and reflection.¹¹⁰ The drafters totally rejected the *Durham* test, because of its difficulties and the ambiguity of the word "product."¹¹¹

100. Gray, *supra* note 59, at 570.

101. *Id.* at 571.

102. See, e.g., W. LAFAVE & A. SCOTT, *supra* note 27, § 38, at 291; Lewinstein (pt. 2), *supra* note 88, at 484.

103. 312 F.2d 847 (D.C. Cir. 1962).

104. 471 F.2d 969 (D.C. Cir. 1972).

105. Annot., 9 A.L.R. 4th 526, 530, 535 (1981).

106. Lewinstein (pt. 2), *supra* note 88, at 490.

107. MODEL PENAL CODE § 4.01 (Proposed Official Draft 1962).

108. MODEL PENAL CODE § 4.01 comment at 157 (Tent. Draft No. 4, 1955).

109. *Id.* at 158.

110. *Id.* at 157.

111. *Id.* at 159.

Today a majority of states has accepted the Model Penal Code provision either as drafted or with minor changes.¹¹² With one exception, the federal circuits have now adopted the test in some form.¹¹³ As one court has noted, "[t]he ALI rule is eclectic in spirit, partaking of the moral focus of *M'Naghten*, [and] the practical accomodation of the 'control rules.'"¹¹⁴ For these reasons this alternative has won general acceptance.

C. Constitutionality

The insanity defense has a long history as part of the jurisprudence of England and America.¹¹⁵ Still, the question of whether the United States Constitution mandates the defense has not been definitively answered, for the Supreme Court has never directly considered the issue.¹¹⁶

State courts,¹¹⁷ however, have found the defense constitutionally required by the due process clause,¹¹⁸ the right to a trial by jury,¹¹⁹ and the prohibition against cruel and unusual punishment.¹²⁰ In *State v. Strasburg*¹²¹ the Washington Supreme Court, noting that the defense, while not specifically mentioned, was in full force when the state constitution was adopted,¹²² determined that the right to a trial by jury embraced the right to have a jury pass on every substantive fact of the alleged crime, including the sanity of the accused.¹²³ The tribunal concluded, "[The statute] has the effect of depriving the appellant of liberty without due process of law, especially in that it deprives him of the right of trial by jury; and is therefore unconstitutional."¹²⁴

More recently, in *State ex rel. Boyd v. Green*¹²⁵ the Florida Supreme Court held that a statutory bifurcated trial proceeding requiring separate trials on the issue of guilt and of insanity violated due process. No evidence of insanity could be admitted until guilt or innocence was determined. The court believed that this statute "raise[d]

112. Annot., 9 A.L.R. 4th 526, 530 (1981).

113. *United States v. Freeman*, 357 F.2d 606 (2d Cir. 1966); *United States v. Currens*, 290 F.2d 751 (3d Cir. 1961); *United States v. Chandler*, 393 F.2d 920 (4th Cir. 1968); *Blake v. United States*, 407 F.2d 908 (5th Cir. 1969); *United States v. Smith*, 404 F.2d 720 (6th Cir. 1968); *United States v. Shapiro*, 383 F.2d 680 (7th Cir. 1967); *United States v. Frazier*, 458 F.2d 911 (8th Cir. 1972); *Wade v. United States*, 426 F.2d 64 (9th Cir. 1970); *Wion v. United States*, 325 F.2d 420 (10th Cir. 1963), *cert. denied*, 377 U.S. 946 (1964); *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972). The 1st Circuit has had no recent opportunity to address this issue. Annot., 56 A.L.R. FED. 326 (1982).

114. *United States v. Brawner*, 471 F.2d 969, 979 (D.C. Cir. 1972).

115. See *supra* text accompanying notes 53-114.

116. See, e.g., *Op. Tenn. Att'y Gen.*, No. 236, slip op. (Aug. 25, 1982). In *Leland v. Oregon*, 343 U.S. 790 (1952), the Supreme Court held that states are not constitutionally required to adopt a particular insanity defense, but did not address the issue of whether the defense itself was required. *Id.* at 800-01.

117. See *infra* text accompanying notes 118-28.

118. U.S. CONST. amend. XIV, § 1. "[N]or shall any State deprive any person of life, liberty, or property without due process of law."

119. U.S. CONST. amend. VI (as applied to the states through the fourteenth amendment).

120. U.S. CONST. amend. VIII (as applied to the states through the fourteenth amendment).

121. 60 Wash. 106, 110 P. 1020 (1910). The Washington Supreme Court analyzed the state constitution which contained a due process provision substantially similar to that in the federal constitution.

122. *Id.* at 115, 110 P. at 1022.

123. *Id.* at 118-19, 110 P. at 1023-24.

124. *Id.* at 123-24, 110 P. at 1025.

125. 355 So. 2d 789 (Fla. 1978).

an irrebuttable presumption of intent which is contrary to . . . due process of law."¹²⁶ The element of intent became irrebuttable because the defendant was not allowed to introduce evidence regarding his mental state at the stage of the trial designed to determine guilt.

Similarly, the Supreme Court of Mississippi in *Sinclair v. State*¹²⁷ held that the elimination of the insanity defense violated due process and also constituted cruel and unusual punishment, which is prohibited by the eighth amendment as applied to the states through the fourteenth amendment. Justice Ethridge reasoned that "it is . . . shocking and inhuman to punish a person for an act when he doesn't have the capacity to know the act or judge its consequences."¹²⁸

The United States Supreme Court indicated in *Trop v. Dulles*¹²⁹ that the eighth amendment is not a fixed and rigid standard. Chief Justice Warren stated that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."¹³⁰ Subsequently, the Court indicated that the infliction of criminal penalties for a status is contrary to the eighth amendment,¹³¹ and in *Powell v. Texas*¹³² five justices concluded that the amendment might also be violated if criminal sanctions are imposed for criminal conduct that the defendant is powerless to avoid.¹³³ Thus, it seems possible that the Supreme Court would also find the abolition of the insanity defense unconstitutional on these grounds.¹³⁴

Two states, Montana¹³⁵ and Idaho,¹³⁶ have ostensibly eliminated the insanity defense. Their statutes differ markedly, however, from those found unconstitutional. Unlike the statutes in *Strasburg* and *Sinclair*, those of Montana and Idaho provide for the admission of evidence and a full hearing on the issue of *mens rea*.¹³⁷ Broadly interpreted, these provisions greatly resemble the insanity defense.¹³⁸ Perhaps the only significant difference is that a defendant must show that he was incapable of forming the particular mental element required by statute for an offense, rather than that he lacked the substantial capacity to appreciate the wrongfulness of his conduct.¹³⁹ The result of the Montana and Idaho laws is similar to a verdict of NGRI for,

126. *Id.* at 794.

127. 161 Miss. 142, 132 So. 581 (1931). The court analyzed the state constitution which contained a due process provision substantially similar to that in the federal constitution.

128. *Id.* at 159, 132 So. at 584 (Ethridge, J., specially concurring).

129. 356 U.S. 86 (1958).

130. *Id.* at 101.

131. *Robinson v. California*, 370 U.S. 660 (1962). The Supreme Court held unconstitutional a statute that made the "status" of narcotics addiction a criminal offense. *Id.* at 667.

132. 392 U.S. 514 (1968).

133. *Id.* This is the opinion of the four dissenters and Justice White, who concurred in the result, but not the reasoning, of the case.

134. Op. Tenn. Att'y Gen., No. 236, slip op. (Aug. 25, 1982).

135. MONT. CODE ANN. §§ 46-14-101 to -102 (1981).

136. IDAHO CODE § 18-207 (Supp. 1982).

137. *Id.* § 18-207(c); MONT. CODE ANN. § 46-14-102 (1981).

138. *Insanity Defense Barred in Idaho*, 68 A.B.A. J. 531, 531 (1982).

139. Diroll, *Insanity Plea Alternatives: A cursory Review of Other States' Laws* (July 22, 1982) (Ohio Legislative Service Commission).

if a jury finds no *mens rea* when mental state is in issue, the defendant may be involuntarily committed to a psychiatric facility after a hearing on his mental competence.¹⁴⁰

III. GUILTY BUT MENTALLY ILL

The insanity plea has been attacked in recent years by the public because of the perception that too many defendants are feigning mental illness and that those acquitted spend too little time in mental institutions.¹⁴¹ This is, to a large degree, a misconception. Only one-half of one percent or less of all felony defendants are found NGRI.¹⁴² Of those, between seven and ten percent commit another offense, compared with between thirty-five and eighty percent of other prisoners.¹⁴³ The perceived need for greater control over insanity acquittees has engendered several options, one of which is the GBMI plea and verdict.

A. History

The guilty but mentally ill laws were created by the Michigan legislature in 1975 as a response to intense public pressure.¹⁴⁴ They have served as the prototype for other states enacting similar legislation.¹⁴⁵

In 1974 the Michigan Supreme Court held in *People v. McQuillan*¹⁴⁶ that automatic commitment for NGRI acquittees was unconstitutional. It cited *Bolton v. Harris*¹⁴⁷ and *Baxstrom v. Herold*¹⁴⁸ as precedent and determined that a presumption of continuing insanity was not justified. "[D]ue Process requires that [the] defendant

140. MONT. CODE ANN. § 46-14-301 (1981); *Reforming the Insanity Defense: Five Views*, STATE LEGISLATURES, Oct. 1982, at 21, 24 (Kenneth McClure, Idaho Deputy Attorney General).

This result is different from that advocated by the legal commentators favoring abolition. One of the abolitionists' chief criticisms of the insanity defense is that it results in commitment instead of release when asserted successfully. Logically, when an element, e.g., *mens rea*, cannot be proved, a defendant should be found not guilty. Abolitionists see the defense as merely a tool to gain social control over the insane without squarely facing the moral implications. They urge lawmakers to directly address these concerns. See Goldstein & Katz, *Abolish the "Insanity Defense"—Why Not?*, 72 YALE L.J. 853 (1963). See also T. SZASZ, LAW, LIBERTY, AND PSYCHIATRY 138-46 (1963); B. WOOTTON, CRIME AND THE CRIMINAL LAW 58-84 (1963).

Opponents of the abolitionist position believe the insanity defense serves an important function as a symbol of the free will model of criminal responsibility. According to their views, if the defense is abolished, social dangerousness will be substituted for moral guilt as the basis for criminal sanctions. This would change the emphasis of the law to a behavioralist position—the trial court would consider only whether an act was committed, and insanity would be considered at the dispositive stage by a panel of experts. Opponents believe this change would create too great a potential for abuse. See Monahan, *Abolish the Insanity Defense?—Not Yet*, 26 RUTGERS L. REV. 719 (1973); see also H. FINGARETTE, THE MEANING OF CRIMINAL INSANITY 1-15 (1972); Brady, *Abolish the Insanity Defense—No!*, 8 HOUS. L. REV. 629 (1971).

141. See generally Sherman, *supra* note 48, at 237-38.

142. Breo & Stacey, *Was Hinckley Insane?*, Am. Med. News, July 9, 1982, at 1, 15, col. 1, 2 (quoting Jonas Rapoport, M.D., expert witness for the prosecution in the Hinckley trial).

143. *Id.* at 15, col. 1. The wide percentage spread is explained by variations in method of count, jurisdiction, or other factors. *Id.*

144. See Comment, *Guilty But Mentally Ill*, *supra* note 26, at 479-83 for a description of events leading to the enactment of the Michigan GBMI laws.

145. See *infra* text accompanying notes 161-72.

146. 392 Mich. 511, 221 N.W.2d 569 (1974).

147. 395 F.2d 642 (D.C. Cir. 1968).

148. 383 U.S. 107 (1966).

be given a sanity hearing to determine present mental condition and equal protection requires that the hearing be substantially similar to other commitment proceedings"¹⁴⁹ A reasonable period of temporary detention was permitted for purposes of examination.¹⁵⁰

Under Michigan law a defendant must be released absent a determination that he is mentally ill and dangerous.¹⁵¹ In practice this means that once the defendant's overt symptoms are brought under control by drugs, the Department of Mental Health no longer considers him mentally ill for purposes of continued hospitalization, and he must be discharged since commitment is no longer automatic.¹⁵² Less than a year after the *McQuillan* decision, sixty-four inmates were released.¹⁵³ Within another year two of them had committed well-publicized violent crimes.¹⁵⁴ The GBMI provisions were the direct outgrowth of the intense public reaction.¹⁵⁵

B. Operation

1. Michigan

Once a defendant asserts the defense of insanity, a judge or jury may find him GBMI instead. The Michigan provision states that:

[T]he defendant may be found "guilty but mentally ill" if, after trial, the trier of fact finds all of the following beyond a reasonable doubt:

- (a) That the defendant is guilty of an offense.
- (b) That the defendant was mentally ill at the time of the commission of that offense.
- (c) That the defendant was not legally insane at the time of the commission of that offense.¹⁵⁶

This law adds the verdict to Michigan's more traditional guilty, not guilty, and not guilty by reason of insanity verdicts. It is aimed at those persons who do not demonstrate sufficient mental disturbance to meet the test of legal insanity and who would otherwise be found guilty.

Once the GBMI verdict is returned, "the court shall impose any sentence which could be imposed pursuant to law upon a defendant who is convicted of the same offense."¹⁵⁷ After the defendant is committed to the custody of the Department of Corrections, he must undergo further evaluations. The treatment indicated may be given either by the Department of Corrections or the Department of Mental Health. If

149. *People v. McQuillan*, 392 Mich. 511, 537, 221 N.W.2d 569, 581 (1974).

150. *Id.*

151. Brown & Wittner, *Criminal Law, 1978 Annual Survey of Michigan Law*, 25 WAYNE L. REV. 335, 356 (1978).

152. *Id.*

153. Comment, *Guilty But Mentally Ill*, *supra* note 26, at 471.

154. See Brown & Wittner, *supra* note 151, at 356-57; Comment, *Guilty But Mentally Ill*, *supra* note 26, at 471-72. John McGee, who claimed to have committed over twenty-five murders, and Ronald Manlen were both committed to mental institutions after receiving verdicts of NGRI. They were released as no longer mentally ill and dangerous following *McQuillan*. Shortly after release, McGee kicked his wife to death, and Manlen raped two women. Brown & Wittner, *supra* note 151, at 356-57.

155. Brown & Wittner, *supra* note 151, at 357-59.

156. MICH. COMP. LAWS ANN. § 768.36(1) (West 1982).

157. *Id.* § 768.36(3).

the defendant is discharged from the latter facility, he will be returned to the Department of Corrections for the balance of his sentence.¹⁵⁸

The statute provides for both a plea and a verdict of GBMI. The judge may not accept the plea, however, until he has examined psychiatric reports, held a hearing on the issue of the defendant's mental illness, and determined that the defendant was mentally ill at the time of the offense.¹⁵⁹ Finally, the statute outlines probation procedures for the GBMI defendant. Treatment is a condition of probation, and failure to continue treatment constitutes a violation of probation. The probation period is for a minimum of five years and will not be shortened without the consideration of psychiatric reports by the sentencing court.¹⁶⁰

2. Other States

Michigan remained the sole proponent of the GBMI plea and verdict for six years, but recently seven additional state legislatures have enacted similar laws.¹⁶¹ The trend toward broadening the base of criminal responsibility is reflected in the statement of the sponsor of the Illinois law:

There are two schools of psychiatric thought. One doesn't agree with me. The other says, "When you have someone who does a horrible crime and pleads not guilty by reason of insanity and is found guilty but mentally ill, he should be held accountable because accountability is therapy." Not only is it therapy, but it is justice.¹⁶²

The new state statutes retain most of the fundamental aspects of the Michigan GBMI law.¹⁶³ The insanity defense is preserved, but a defendant asserting it may be found GBMI. Also, the sentence imposed by the court must be identical to that which could be imposed for a guilty verdict.

The most fundamental discrepancy between the Michigan laws and those of other states appears in the legal definition of insanity. Since a defendant may be found GBMI only if he is not legally insane, the definition of insanity used in each jurisdiction has broad ramifications for the scope of the GBMI verdict. Michigan, Illinois, Indiana, and Kentucky use either the Model Penal Code test or a variation.¹⁶⁴ Georgia and New Mexico retain the *M'Naghten* test, modified by the irresistible impulse standard.¹⁶⁵ When Delaware enacted GBMI, it narrowed the insanity test

158. *Id.*

159. *Id.* § 768.36(2).

160. *Id.* § 768.36(4).

161. ALASKA STAT. §§ 12.47.030-.050 (Supp. 1982); DEL. CODE ANN. tit. xi, §§ 408-409 (Supp. 1982); GA. CODE ANN. § 17-7-131 (Supp. 1982); ILL. ANN. STAT. ch. 38, §§ 113-4, 115-1 to -4, 1005-2-6 (Smith-Hurd Supp. 1982); IND. CODE ANN. §§ 35-35-1-1 to -4, 35-35-2-1, 35-36-2-5 (Burns Supp. 1982); KY. REV. STAT. ANN. §§ 504.120-150 (Bobbs-Merrill Supp. 1982); N.M. STAT. ANN. §§ 31-9-3 to -4 (Supp. 1982).

162. *Reforming the Insanity Defense: Five Views*, STATE LEGISLATURES, Oct. 1982, at 21, 24 (Senator Adeline Geo-Karis).

163. Diroll, *Insanity Plea Alternatives: A cursory Review of Other States' Laws* (July 22, 1982) (Ohio Legislative Service Commission).

164. ILL. ANN. STAT. ch. 38, § 6-2 (Smith-Hurd Supp. 1982); IND. CODE ANN. § 35-41-3-6(a) (Burns 1979); KY. REV. STAT. ANN. § 504.060 (Bobbs-Merrill Supp. 1982); MICH. COMP. LAWS ANN. § 768.21a (West 1982).

165. GA. CODE ANN. §§ 16-3-2 to -3 (1982); *State v. White*, 58 N.M. 324, 270 P.2d 727 (1954).

from the Model Penal Code to the *M'Naghten* test,¹⁶⁶ and consequently expanded the number of people who may be found GBMI. Alaska, though, has made the most radical change:¹⁶⁷ it finds a defendant insane only when he is "unable, as a result of a mental disease or defect, to appreciate the nature and quality of [his] conduct."¹⁶⁸ The Alaska standard is even narrower than the *M'Naghten* test, which also excused criminal responsibility when the defendant knew the nature of the act, but did not appreciate its wrongfulness.¹⁶⁹ Thus, only one prong of the traditional *M'Naghten* test exculpates the defendant. Alaska specifically requires a jury to return a finding of GBMI when the Model Penal Code standard of legal insanity is met.¹⁷⁰ In effect, the law requires conviction of all but those who suffer from the most extreme forms of mental illness, such as the man who believes he is squeezing lemons when he strangles his wife.¹⁷¹ This approach is particularly subject to constitutional attack. It narrows legal insanity almost to the point of nonexistence and may unconstitutionally deprive defendants of the insanity defense.¹⁷²

C. Constitutional Problems

Commentators have attacked the GBMI verdict and plea on a variety of constitutional grounds.¹⁷³ These include charges that the verdict and plea violate due process, equal protection, and the prohibition against cruel and unusual punishment, and that the misapplication of the verdict and plea effectively abolishes the insanity defense.¹⁷⁴ Thus far, however, the courts have upheld the statutes.¹⁷⁵

1. Due Process

Due process has served as the basis for one of the strongest constitutional assaults on GBMI. Under the holding in *People v. McQuillan*¹⁷⁶ insanity acquittees are entitled to a hearing to determine present mental health since institutionalization would represent a significant restriction on a defendant's liberty interest,¹⁷⁷ but the

166. DEL. CODE ANN. tit. xi, § 401(a) (Supp. 1982). See Annot., 9 A.L.R. 4th 526 (1981) for previous tests. See Bonnie, *The Moral Basis of the Insanity Defense*, 69 A.B.A. J. 194, 195-97 (1983), for a favorable view of this change.

167. ALASKA STAT. § 12.47.010 (Supp. 1982). Alaska, prior to GBMI, used the Model Penal Code test. Annot., 9 A.L.R. 4th 526, 536 (1981).

168. ALASKA STAT. § 12.47.010 (Supp. 1982).

169. See *supra* text accompanying note 81.

170. ALASKA STAT. § 12.47.030 (Supp. 1982).

171. MODEL PENAL CODE § 4.01 commentary at 156 (Tent. Draft No. 4, 1955).

172. See *infra* text accompanying notes 217-27.

173. See Sherman, *supra* note 48, at 256-60; Comment, *Guilty But Mentally Ill*, *supra* note 26, at 489-96; Comment, *The Constitutionality of Michigan's Guilty But Mentally Ill Verdict*, 12 U. MICH. J.L. REF. 188, 191-95 (1978); Comment, *Criminal Responsibility: Changes in the Insanity Defense and the "Guilty But Mentally Ill" Response*, 21 WASHBURN L.J. 515, 546-51 (1982) [hereinafter cited as Comment, *Criminal Responsibility*]; Comment, *Insanity—Guilty But Mentally Ill—Diminished Capacity: An Aggregate Approach to Madness*, 12 J. MAR. J. PRAC. & PROC. 351, 369-76 (1979).

174. See *infra* text accompanying notes 176-227.

175. Michigan decisions are emphasized because that state has had GBMI for eight years, while other states have enacted GBMI laws too recently to have generated much case law to date.

176. 392 Mich. 511, 221 N.W.2d 569 (1974).

177. *Id.* at 536, 221 N.W.2d at 580.

Michigan GBMI statute makes no provision for a hearing in the case of the GBMI defendant.

In *People v. McLeod*¹⁷⁸ the Michigan Supreme Court held that a sentencing court must obtain a psychiatric report evaluating a defendant's present mental health prior to sentencing,¹⁷⁹ but specifically determined that due process did not require a hearing.¹⁸⁰ The court reasoned that the GBMI defendant was situated differently than the NGRI acquittee and concluded that the GBMI defendant "no longer [had] a right to unfettered liberty"¹⁸¹ since he had been found guilty.

The recent United States Supreme Court decision in *Vitek v. Jones*¹⁸² puts the above result into question. In *Vitek* a Nebraska statute dealing with the involuntary transfer of a state prisoner to a mental hospital was held to implicate liberty interests protected by the due process clause.¹⁸³ Loss of liberty was characterized by the court as involving "more than a loss of freedom from confinement."¹⁸⁴ "[T]he stigmatizing consequences of a transfer to a mental hospital for involuntary psychiatric treatment, coupled with the subjection of the prisoner to mandatory behavior modification as a treatment for mental illness, constitute the kind of deprivations of liberty that requires procedural protections."¹⁸⁵ The Court held that a hearing on the prisoner's mental state was an integral part of those protections.¹⁸⁶ Although arguably GBMI defendants are in a substantially different position than inmates because of the prior judicial determination of mental illness,¹⁸⁷ a strong possibility exists that the lack of a hearing may be sufficient to trigger due process problems.

2. Equal Protection

Courts have also been confronted with, and have rejected, equal protection challenges to GBMI.¹⁸⁸ Opponents regard the classification of GBMI as irrational and any disparate treatment based on that classification as violating the equal protection clause.¹⁸⁹ In *People v. McLeod*¹⁹⁰ the defendant argued that the minimum probation period of five years violated equal protection because other persons convicted of the same crimes faced no equivalent minimal term.¹⁹¹ For purposes of equal protection a classification is acceptable if it rationally furthers the object of the

178. 407 Mich. 632, 288 N.W.2d 909 (1980).

179. *Id.* at 658, 288 N.W.2d at 917.

180. *Id.*

181. *Id.* at 659, 288 N.W.2d at 917.

182. 445 U.S. 480 (1980).

183. *Id.* at 494.

184. *Id.* at 492.

185. *Id.* at 494.

186. *Id.* at 494-95.

187. Comment, *Criminal Responsibility*, *supra* note 173, at 548-49.

188. See, e.g., *Taylor v. State*, — Ind. —, 440 N.E.2d 1109 (1982); *People v. McLeod*, 407 Mich. 632, 288 N.W.2d 909 (1980); *People v. Rone*, 109 Mich. App. 702, 311 N.W.2d 835 (1981); *People v. Sorna*, 88 Mich. App. 351, 276 N.W.2d 892 (1979); *People v. Sharif*, 87 Mich. App. 196, 274 N.W.2d 17 (1978); *People v. Darwall*, 82 Mich. App. 652, 267 N.W.2d 472 (1978); *People v. Jackson*, 80 Mich. App. 244, 263 N.W.2d 44 (1977).

189. See, e.g., Comment, *Criminal Responsibility*, *supra* note 173, at 546.

190. 407 Mich. 632, 288 N.W.2d 909 (1980).

191. *Id.* at 656-57, 288 N.W.2d at 916.

legislation, unless a classification is inherently suspect or a fundamental interest is implicated.¹⁹² Since no evidence of a suspect classification was introduced and no fundamental interest was infringed, the court concluded that the legislation was rationally related to the state's purpose of assuring supervised medical treatment for convicted individuals suffering from mental illness.¹⁹³ The Michigan Court of Appeals has also refused to recognize a hearing requirement for a GBMI defendant, even though a person found guilty of the same offense must be granted a hearing before he may be subject to involuntary treatment.¹⁹⁴

Challengers of the GBMI verdict have additionally argued that GBMI defendants are in the same position as persons who are mentally ill, but not guilty of an offense. While mental illness is common to both classes, the added element of guilt is a major difference that probably can justify the inequality of treatment.¹⁹⁵

In *People v. Sorna*¹⁹⁶ a third ground for equal protection was invoked—the classification of GBMI defendants vis-à-vis people found not guilty by reason of insanity. The defendant argued that the definitions of mental illness and legal insanity were based on similar behavioral characteristics and, therefore, it was irrational to find criminal responsibility in one case and not in the other.¹⁹⁷ The Michigan Court of Appeals held that GBMI constituted a legitimate intermediate category with a rational basis.¹⁹⁸ The Indiana Supreme Court in *Taylor v. State*¹⁹⁹ conceded that the application of the definitions might be difficult, but reached the same conclusion as the *Sorna* court, which it cited approvingly.²⁰⁰

Finally, but no more persuasively, critics have posited that GBMI defendants are in the same position as defendants who were mentally ill at the time of their offense, but who do not plead insanity.²⁰¹ The Michigan Court of Appeals quickly dealt with this argument by holding that legislatures need not make every category all inclusive and nonarbitrary.²⁰²

It is unlikely that these challenges will ever be successful. Equal protection demands not identical treatment, but only that differences bear some relevance to the purposes of the classification.²⁰³ Since GBMI involves neither a suspect classification nor a fundamental interest, a state must meet only the lower “rational relationship” standard.²⁰⁴ The existence of both guilt and mental illness significantly dif-

192. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 40, 55 (1973).

193. 407 Mich. 632, 663, 288 N.W.2d 909, 919 (1980).

194. *People v. Sharif*, 87 Mich. App. 196, 274 N.W.2d 17 (1978). The court found it reasonable for the legislature to provide hearings only for those whom correction officials contemplated transferring. All GBMI defendants receive evaluations; the purpose of the hearing prior to transfer is to determine whether treatment would be best provided by a mental health facility. *Id.* at 200–01, 274 N.W.2d at 19–20.

195. Comment, *Guilty But Mentally Ill*, *supra* note 26, at 491.

196. 88 Mich. App. 351, 276 N.W.2d 892 (1979).

197. *Id.* at 359–60, 276 N.W.2d at 896.

198. *Id.* at 360, 276 N.W.2d at 896.

199. — Ind. —, 440 N.E.2d 1109 (1982).

200. *Id.* at —, 440 N.E.2d at 1112–13.

201. See, e.g., Comment, *Criminal Responsibility*, *supra* note 173, at 547.

202. *People v. Jackson*, 80 Mich. App. 244, 263 N.W.2d 44 (1977).

203. *Baxstrom v. Herold*, 383 U.S. 107, 111 (1966).

204. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 40 (1973).

ferentiates people found GBMI from other groups.²⁰⁵ It is probable that the GBMI classification will always be found rationally to further a state's legitimate objectives of protecting society and providing mental health treatment.

3. *Cruel and Unusual Punishment*

The eighth amendment's protection against cruel and unusual punishment forbids disproportionate punishment for the violation of a criminal statute.²⁰⁶ Three aspects of the GBMI verdict give rise to eighth amendment issues. First, a presently competent person may be sentenced to a mental institution.²⁰⁷ Without a hearing to determine the issue of present mental health, sane people may be sent to a mental institution where they will receive unnecessary psychiatric treatment.²⁰⁸ Although a mental examination is required after trial for the purpose of sentencing, this safeguard is insufficient since the GBMI prisoner is unable to dispute the finding.

Second, someone who is actually insane may be found GBMI and forced to serve a prison term.²⁰⁹ The Supreme Court has commented in dictum that the imposition of criminal sanctions on a person who is mentally ill would "doubtless be universally thought to be an infliction of cruel and unusual punishment."²¹⁰ While it is true that the GBMI verdict is not aimed at imprisoning the insane, it appears probable that because of the fine distinctions between definitions of mental illness and insanity, people who should be found NGRI are being found GBMI.²¹¹

Third, GBMI inmates will be afforded inadequate treatment and thus will be subjected to cruel and unusual punishment.²¹² The extra security measures necessary for the GBMI inmate will preclude him from taking advantage of the important psychiatric treatment that is available to his civil counterpart.²¹³ The Supreme Court has held that the eighth amendment guarantees adequate medical treatment.²¹⁴ While an individual GBMI inmate may receive inadequate treatment, this argument probably would not be enough to invalidate the statute. For, as the Michigan Supreme Court found in *McLeod*,²¹⁵ the statute provides for adequate treatment, and noncompliance by the Department of Corrections cannot "render an otherwise constitutional statute unconstitutional."²¹⁶

4. *Misapplication of GBMI*

Undoubtedly, the most problematic constitutional question arises when insane persons are found GBMI. Assuming that a constitutional right to an insanity defense exists, this finding would unconstitutionally deprive some defendants of its use.

205. Comment, *Guilty But Mentally Ill*, *supra* note 26, at 491.

206. *Weems v. United States*, 217 U.S. 349, 366-67 (1910).

207. *Sherman*, *supra* note 48, at 258.

208. *Id.* at 258-59.

209. *Id.* at 257.

210. *Robinson v. California*, 370 U.S. 660, 666 (1962).

211. See, e.g., Note, *Revolving Door*, *supra* note 30, at 995.

212. Comment, *Criminal Responsibility*, *supra* note 173, at 549-50.

213. *Sherman*, *supra* note 48, at 258.

214. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

215. 407 Mich. 632, 288 N.W.2d 909 (1980).

216. *Id.* at 655, 288 N.W.2d at 915. A possible remedy for the individual GBMI inmate would be to apply for a writ of mandamus to force the Department of Corrections to meet its statutory obligations. *People v. Sorna*, 88 Mich. App. 351, 362, 276 N.W.2d 892, 897 (1979).

Moreover, the GBMI statute may create jury confusion and encourage jury misconduct.²¹⁷

Jury confusion can result from the subtle distinctions between legal insanity and mental illness.²¹⁸ To be found GBMI, a defendant must be found mentally ill, but not legally insane. Michigan uses a modified version of the Model Penal Code to define insanity. "A person is legally insane if, as a result of mental illness . . . , or as a result of mental retardation . . . , that person lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law."²¹⁹ Mental illness is defined as "a substantial disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life."²²⁰ While some commentators believe these definitions are no more difficult to grasp than a reasonable man standard,²²¹ a strong possibility exists that jurors may confuse insanity and mental illness, particularly in jurisdictions where the broader Model Penal Code test is used.²²² The average juror lacks familiarity with the concepts of mental illness and insanity and, therefore, the application of the definitions is more difficult than a reasonable man test. The consequences of any error are also more severe in criminal cases than in the civil case in which the reasonable man test is applied.

A more troubling problem arises because of jury misuse of the verdict. GBMI may be an attractive compromise for jurors who believe that dangerous people should be kept in custody and that a GBMI verdict will grant special treatment for the defendant.²²³ In reality, the verdict is substantially the same as a guilty verdict since other statutes provide psychiatric evaluations and mental health services for all convicted persons.²²⁴ A Michigan study showed that seventy-five percent of those found GBMI are sent to prison and receive no treatment.²²⁵ Judge Beasley of the Michigan Court of Appeals wrote, "There is just not enough money in Michigan to give that psychiatric treatment."²²⁶ A jury may decide to return the GBMI verdict without properly applying the law to the facts. Such a decision would result in the disintegration of the insanity defense.²²⁷

Of the constitutional challenges to GBMI, jury misapplication, whether inadvertent or conscious, is the most compelling. Juries may find an insane defendant GBMI as the result of either confusion or a conscious choice to ignore the law in

217. Comment, *The Constitutionality of Michigan's Guilty But Mentally Ill Verdict*, 12 U. MICH. J.L. REF. 188, 195-98 (1978).

218. The Michigan Court of Appeals addressed this question in *People v. Ramsey*, 89 Mich. App. 468, 280 N.W.2d 565, *leave to appeal denied*, 407 Mich. 861 (1979). It concluded, rather artificially, that "a reading of the statutes refutes defendant's arguments." *Id.* at 472, 280 N.W.2d at 567.

219. MICH. COMP. LAWS ANN. § 768.21a(1) (West 1982).

220. *Id.* § 330.1400a.

221. Comment, *Insanity—Guilty But Mentally Ill—Diminished Capacity: An Aggregate Approach to Madness*, 12 J. MAR. J. PRAC. & PROC. 351, 375 (1979).

222. Comment, *Criminal Responsibility*, *supra* note 173, at 550 n.254.

223. Comment, *The Constitutionality of Michigan's Guilty But Mentally Ill Verdict*, 12 U. MICH. J.L. REF. 188, 197-98 (1978).

224. *Id.* at 198.

225. *The Insanity Plea on Trial*, NEWSWEEK, May 24, 1982, at 56, 60.

226. *Reforming the Insanity Defense: Five Views*, STATE LEGISLATURES, Oct. 1982, at 21, 25 (Judge William R. Beasley).

227. See Comment, *Guilty But Mentally Ill*, *supra* note 26, at 492-93.

order to reach a compromise verdict. The cloak of secrecy that veils jury deliberations insulates the process from review. Thus, a defendant may easily be unconstitutionally deprived of the insanity defense.

IV. OHIO

A. Present Law

Current Ohio law provides for pleas of guilty, not guilty by reason of insanity, not guilty, and no contest.²²⁸ The test for insanity, announced in *State v. Staten*,²²⁹ is similar to the Model Penal Code formulation. Ohio, however, requires total, rather than just a substantial, lack of capacity to appreciate the wrongfulness of an act.²³⁰ When the issue of insanity is introduced, the accused carries the burden of persuasion in Ohio.²³¹

Once a person is acquitted on the ground of insanity, special procedures come into operation.²³² A full hearing must be conducted to determine the issue of present mental health,²³³ and a defendant may be committed if he is found to be mentally ill by clear and convincing evidence.²³⁴ When determining the nature of commitment, a judge must use the least restrictive alternative consistent with the public safety and welfare.²³⁵ A conditional release may terminate no later than the expiration of the maximum sentence a person could have served if he had been convicted.²³⁶ Finally, at the expiration of the sentence the prosecutor must be notified so that he may institute civil commitment procedures.²³⁷

Ohio currently has provisions for transferring any prisoner who is mentally ill and "subject to hospitalization by court order"²³⁸ to a facility operated by the

228. OHIO R. CRIM. P. 11(A).

229. 18 Ohio St. 2d 13, 247 N.E.2d 293 (1969).

230. *Id.* at 21, 247 N.E.2d at 299. The court stated the test as follows:

In order to establish the defense of insanity, the accused must establish by a preponderance of the evidence that disease or other defect of his mind had so impaired his reason that, at the time of the criminal act with which he is charged, either he did not know that such act was wrong or he did not have the ability to refrain from doing that act.

Id. (footnotes omitted).

231. *Id.*

232. During the 113th General Assembly (1980-1981) Senate Bill No. 297 was introduced. It created a GBMI law. Due to substantial opposition, however, the bill was redrafted to create post trial procedures for defendants found NGRI. Diroll, *Discussion of the NGRI Verdict and Michigan's "Guilty But Mentally Ill" Finding* (Feb. 17, 1981) (Ohio Legislative Service Commission).

233. OHIO REV. CODE ANN. § 2945.40(A) (Page 1982).

234. *Id.* § 2945.40(B). This is a change from the earlier requirement of "beyond a reasonable doubt". See *supra* note 232.

235. OHIO REV. CODE ANN. § 2945.40(D)(1) (Page 1982).

236. *Id.* § 2945.40(D)(6).

237. *Id.*

238. *Id.* § 5122.01(B). The statute reads:

(B) "Mentally ill person subject to hospitalization by court order" means a mentally ill person who, because of his illness:

(1) Represents a substantial risk of physical harm to himself as manifested by evidence of threats of, or attempts at, suicide or serious self-inflicted bodily harm;

(2) Represents a substantial risk of physical harm to others as manifested by evidence of recent homicidal or other violent behavior, evidence of recent threats that place another in reasonable fear of violent behavior and serious physical harm, or other evidence of present dangerousness;

Department of Mental Health for treatment. Thus, the existing law would seem to adequately care for those who have been found guilty, but are suffering from mental illness.

B. GBMI Proposal

The recent public clamor over the insanity defense has spurred the Ohio Legislature to consider GBMI proposals.²³⁹ Ohio followed other states in modelling its provisions after the Michigan laws, with a few major differences.

An important variation concerns the factual findings required for the proper return of a GBMI verdict.

The Court or Jury shall not find a defendant guilty but mentally ill unless it finds all of the following:

- (1) The prosecution proved beyond a reasonable doubt that the defendant is guilty of the offense with which he is charged;
- (2) The defendant proved by a preponderance of the evidence that he was suffering from a mental illness at the time of the commission of the offense;
- (3) The defendant did not prove by a preponderance of the evidence that he is not guilty by reason of insanity of the offense.²⁴⁰

These provisions reflect Ohio's decision to place the burden of proof on the defendant when the issue of insanity is introduced. Some commentators believe this obviates any need for the GBMI verdict.²⁴¹ GBMI laws resulted largely from public distress over NGRI verdicts returned in cases like the Hinckley trial.²⁴² The result reached in that trial would be improbable in Ohio, where the defendant, rather than the prosecution, has the burden of persuasion on the issue of insanity.

Perhaps to meet some of the constitutional objections aimed at the Michigan statute, the Ohio Legislature has required a hearing to determine whether the person found GBMI is presently mentally ill.²⁴³ Although this provision skirts some of the

(3) Represents a substantial and immediate risk of serious physical impairment or injury to himself as manifested by evidence that he is unable to provide for and is not providing for his basic physical needs because of his mental illness and that appropriate provision for such needs cannot be made immediately available in the community; or

(4) Would benefit from treatment in a hospital for his mental illness and is in need of such treatment as manifested by evidence of behavior that creates a grave and imminent risk to substantial rights of others or himself.

Id.

239. The most recent is Senate Bill No. 13, which was introduced and is still pending in the 115th General Assembly (1983-1984), Regular Session. It is identical to Amended Substitute Senate Bill No. 148, which was passed by the Senate in the 114th General Assembly (1981-1982), Regular Session. All references in this Comment will be to S.B. 148 since no action has yet been taken by the Senate Judiciary Committee on S.B. 13. House Bill 1005, also introduced in the 114th General Assembly, differed from the Senate bill only in that it required certain written instructions for the jury.

240. S. 148, 114th Gen. Assy., Reg. Sess. § 2945.391(C) (Ohio 1981-1982).

241. See, e.g., Note, *Revolving Door*, *supra* note 30, at 1023.

242. See e.g., Kaufman, *supra* note 1, at 16.

243. S. 148, 114th Gen. Assy., Reg. Sess. § 2945.392(B) (Ohio 1981-1982). The statute reads:

(B) Except as provided in section 2951.04 of the Revised Code, within a reasonable time after the court or jury finds a person guilty but mentally ill, the trial court shall hold a hearing to determine whether the person is a mentally ill person subject to hospitalization by court order, as defined in division (B) of section 5122.01 of the Revised Code.

Except as otherwise provided, the hearing shall be conducted pursuant to divisions (A)(1) to (5) and (A)(8) to (15) of section 5122.15 of the Revised Code. The hearings shall be open to the public. The prosecutor shall

due process concerns that arose in Michigan, it creates different problems. After a finding of GBMI, the prosecutor must show by clear and convincing evidence that the accused is "mentally ill subject to court-ordered hospitalization" for the defendant to receive treatment.²⁴⁴ The prosecutor, however, has no interest in succeeding.²⁴⁵ Unlike the NGRI acquittee, who will go free unless the prosecutor proves insanity, the GBMI defendant will be confined, whatever the outcome of the hearing. Thus, it is possible that the GBMI defendant will receive no treatment. If the requisite mental illness is proved, Ohio allows the judge to commit inmates directly to the state's mental facilities.²⁴⁶ This unique provision generated opposition from the Department of Mental Health, which believed that the procedure would lead to inappropriate commitments and would create immense administrative strain on the hospitals.²⁴⁷

Ohio currently uses a definition of mental illness that is very similar to Michigan's,²⁴⁸ a definition likely to cause jury confusion when coupled with Ohio's version of the Model Penal Code's insanity test.²⁴⁹ The proposed bill, however, utilizes a definition of insanity very similar to the *M'Naghten* rule.²⁵⁰ All reference to

present the case demonstrating that the person found guilty but mentally ill is a mentally ill person subject to hospitalization by court order.

If the court determines at the hearing that there is clear and convincing evidence that the person found guilty but mentally ill is a mentally ill person subject to hospitalization by court order, the court, after imposing sentence pursuant to division (A) of this section, shall provide for the treatment of the person in either of the following ways:

(1) Require the Department of Rehabilitation and Correction, or the county or municipal jail or workhouse to which the person is sentenced, to provide the necessary treatment;

(2) Commit the person for treatment and secure confinement to the Department of Mental Health for all or a part of his sentence and require that the person, after the Department determines that he is no longer a mentally ill person subject to hospitalization by court order, be transferred for the remainder of his sentence to the Department of Rehabilitation and Correction or to a county or municipal jail or workhouse. The person shall be considered a prisoner while in the custody of the Department of Mental Health.

The court shall send to the place of incarceration or commitment all reports of the mental condition of the person found guilty but mentally ill at the time of the offense and at the time of commitment that were prepared pursuant to section 2945.39 of the Revised Code and any other information the court considers relevant, including any part of the trial transcript.

Id.

244. *Id.*

245. *Guilty But Mentally Ill: Testimony on S.B. 148 Before the Senate Judiciary Comm.*, 114th Gen. Assy., Reg. Sess. (1981-1982) (statements of Ann Britton, Professor of Law, C. Blake McDowell Law Center, University of Akron (July 19, 1982), and Philip J. Resnick, M.D., Associate Professor of Psychiatry, Medical College, Case Western Reserve University (Feb. 22, 1982)).

246. S. 148, 114th Gen. Assy., Reg. Sess. § 2945.392(B)(2) (Ohio 1981-1982). *See supra* note 243.

247. *Guilty But Mentally Ill: Testimony on S.B. 148 Before the Senate Judiciary Comm.*, 114th Gen. Assy., Reg. Sess. (1981-1982) (statement by a representative of the Department of Mental Health (July 22, 1982)).

248. S. 148, 114th Gen. Assy., Reg. Sess. § 2945.391(D) (Ohio 1981-1982). The statute reads:

(D) As used in the Revised Code, a person is "guilty but mentally ill" if he proves by a preponderance of the evidence that, at the time of the offense, a substantial disorder of thought, mood, perception, orientation, or memory grossly impaired his judgment, behavior, or his capacity to recognize reality or ability to meet the ordinary demands of life, and that the disorder was a substantial factor contributing to the commission of the offense.

Id.

249. *See supra* text accompanying notes 217-20.

250. S. 148, 114th Gen. Assy., Reg. Sess. § 2945.391(E) (Ohio 1981-82). The statute reads:

(E) As used in the Revised Code, a person is "not guilty by reason of insanity" if he proves by a preponderance of the evidence that, at the time of the criminal act, he was suffering from a mental disease or defect that so impaired his reason that he did not know that his act was wrong.

Id.

a volitional component has been removed. While the deletion may make the confusion over terms less likely, it greatly reduces the number of people who may be found NGRI. Thus, the object of the bill is all too apparent: it is aimed at vastly enlarging the number of people who may be held criminally responsible for their offenses despite their mental state. Any therapeutic purpose is belied since no more treatment is guaranteed than is currently available to prisoners by virtue of section 5120.17 of the Ohio Revised Code.²⁵¹

Ohio has a special problem with the plea of GBMI.²⁵² Article IV, section 5(B), of the Ohio Constitution grants the Ohio Supreme Court authority to prescribe rules governing practice and procedure in all courts. Pursuant to this power, it has promulgated the pleas available in criminal cases. They do not include GBMI.²⁵³ Although it may be argued that pleas affect substantive rights, the supreme court may reject the proposed plea as an unconstitutional legislative usurpation of judicial authority.²⁵⁴

V. THE PRACTICAL IMPLICATIONS OF GBMI AND PROPOSALS FOR CHANGE

The guilty but mentally ill verdict is a poor choice for states seeking the reform of the insanity defense. Although it purportedly aims to provide psychiatric treatment to those mentally ill defendants who would otherwise be found guilty, on examination the results of the application of GBMI are quite different. It is but a thinly veiled disguise for the abolition of the insanity defense. Legislatures, fearing the constitutional morass of a straightforward repeal of the defense, attempt to reach the same result by creating the GBMI verdict. The real purpose of the law is not treatment but commitment. State legislatures pass the law while fully aware that they will be financially unable to provide adequate treatment. For example, Georgia specifically limits treatment to that "within the limits of state funds appropriated therefor."²⁵⁵ Furthermore, most states, like Ohio, already have statutes that provide for the transfer of mentally ill prisoners to mental hospitals. Particularly telling is the narrowing of the scope of the insanity defense, the only possible reason for which would be to broaden the range of persons who may be held criminally responsible for their acts.

Theoretical objections aside, GBMI laws are beset with constitutional and practical problems. Failure to provide a hearing to determine present mental health raises legitimate due process concerns. The inadequacy of treatment that results from GBMI, if not violative of eighth amendment rights, at least demonstrates the capability problem. At present, states have neither the resources nor the funds to provide the treatment they seem to be promising. Additionally, juries may be misled by the law's

251. *Guilty But Mentally Ill: Testimony on S.B. 148 Before the Senate Judiciary Comm.*, 114th Gen. Assy., Reg. Sess. (1981-1982) (statement by Carol King, Staff Attorney, Ohio Legal Rights Service (July 19, 1982)).

252. STAFF OF SENATE COMM. ON THE JUDICIARY, 114th GEN. ASSY., REG. SESS., REPORT ON SUB. S. 148 (March 12, 1981).

253. OHIO R. CRIM. P. 11(A).

254. STAFF OF SENATE COMM. ON THE JUDICIARY, 114th GEN. ASSY., REG. SESS., REPORT ON SUB. S. 148 (March 12, 1981).

255. GA. CODE ANN. § 17-7-131(g) (Supp. 1982).

hypocrisy and be tempted to use GBMI as a compromise in an effort to secure specialized treatment for a defendant while at the same time guaranteeing commitment. Even if jury abuse does not occur, the similarities between definitions of insanity and mental illness make it likely that some insane defendants will be imprisoned. The result is the same: defendants are deprived of the insanity defense.

Legislatures considering GBMI should reject it as a simplistic solution to a complex problem. They should critically examine the motivation behind the creation of GBMI. One of the problems that directly led to the law's enactment was the "revolving door" aspect of NGRI—the fear that acquittees would be "back on the street" in a short time. Legislatures should address this problem directly.

At trial some alleviative measures could be taken. First, jury instructions on NGRI could be made clearer.²⁵⁶ To overcome undue reliance on psychiatric testimony, the jury should be given detailed instructions specifying that they are the ultimate factfinders. Special verdicts, rather than general, would guarantee that the jury truly understood the standard that it was to apply. Second, and crucial to the resolution of the revolving door problem, the burden of persuasion should be placed on the defendant.²⁵⁷ This would remedy a notable procedural anomaly. Under current procedure the prosecution has the burden of proving a defendant's sanity beyond a reasonable doubt at trial and, if acquitted, his mental illness by a lower standard at a civil commitment hearing. A NGRI acquittee may be prematurely released if the prosecution fails to prove either.

After a NGRI acquittee has been committed, release standards should be tightened. Psychiatrists and courts differ on the requirements for continued commitment, as evidenced by Michigan's post-*McQuillan* experience.²⁵⁸ Presently, acquittees may be released although they are still afflicted with the condition that resulted in the acquittal.²⁵⁹ Requiring that the release of an NGRI acquittee be conditioned on the facts that first led to the acquittal and initial commitment would be a solution.

The insanity defense is a fundamental part of the criminal justice system, and its reform should not be undertaken without careful deliberation. The GBMI plea and verdict assuage public concerns by subverting the defense. While at first glance the law is appealing, on further consideration its problems and objectionable purposes become apparent. The GBMI alternative should be rejected and legislative energies directed toward more equitable and productive changes in the procedures governing NGRI acquittees.

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256. Kaufman, *supra* note 1, at 19.

257. See *supra* text accompanying notes 28–46.

258. See *supra* text accompanying notes 144–55.

259. Note, *Revolving Door*, *supra* note 30, at 974–75.